

Analysis and Recommendations

(Revised March 2006)

Article 2:

First: Islam is the official religion of the State and is a foundation source of legislation:

- A. No law may be enacted that contradicts the established provisions of Islam
- B. No law may be enacted that contradicts the principles of democracy.
- C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.

Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans.

Summary

- Under international standards, a state may declare an official state religion, provided basic rights, including the *individual* right to freedom of thought, conscience, and religion or belief, are respected for all without discrimination.
- The framework of Art. 2, including establishing Islam as a "foundation source of legislation" and prohibiting any law "that contradicts the established provisions of Islam" or "the rights and basic freedoms" provided in the constitution, follows the compromises developed in Iraq's Transitional Administrative Law (TAL), with some slight variations.

Commentary

Under the *International Covenant on Civil and Political Rights* (ICCPR), [\[1\]](#) the fact

[That] a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant. [\[2\]](#)

In other words, a state is entitled to declare an official state religion, provided that this does not result in discrimination against or the impairment of any rights of non-believers or adherents of other religions as enumerated under the ICCPR.

Article 2 establishes Islam as "a foundation source of legislation." According to a recent study undertaken by the U.S. Commission on International Religious Freedom (USCIRF), a number of Muslim countries where Islam is the state religion, including Egypt and the Gulf states, establish Islamic law, principles, or jurisprudence as "the basis for," "the principal source of," "a principal source of," or "the source of" legislation. [\[3\]](#) However, in many of these cases, "no additional constitutional guidance is given to address the question of what governmental body, process, or mechanism, if any, is charged with assessing the conformity of legislation with Islamic principles or law." [\[4\]](#) Moreover, many of these constitutions fail to provide any further definition of terms such as Islam or sharia to facilitate or limit interpretation of what "sharia" means.

In the case of Iraq, the new permanent constitution makes Islam "a foundation source of legislation," and specifies that the Federal Supreme Court will be tasked with "Interpreting the provisions of the Constitution." [\[5\]](#) It appears that the new constitution also attempts to limit the scope of possible interpretation under which the legislature or judiciary might determine that a law is in fact contrary to Islam by stating that no law can contradict "the established provisions of Islam." This formulation of article 2 follows closely the framework originally set out in the TAL,

[\[6\]](#)
with two modifications:

1. Islam is declared "a foundation source" rather than "a source of legislation"; and
2. No law can contradict "the established provisions of Islam" rather than its "universally agreed tenets." [7]

While the task of defining the scope and legal meaning of the term "established provisions of Islam" ultimately is expected to fall to the Federal Supreme Court, the constitution also requires, again following closely the TAL formula, that the Court simultaneously ensure that no law is contrary to the "rights and basic freedoms stipulated in [the] constitution." The inclusion of this provision represents a significant improvement over initial draft language, as it appears to place respect for Islam and human rights on an equal level. Moreover, this approach is favorable to other "repugnancy clause" models, such as in the Afghan constitution, which fails to explicitly require the interpretation of Islam to be in accordance with human rights protections.

Despite the apparent effort to constrain any potential interpretation of Islam from going beyond its "established provisions" or running counter to human rights guaranteed in the constitution, USCIRF previously has expressed concern, in the case of the TAL, that a constitutional arrangement establishing a role for Islam as a source of legislation nevertheless "could be used by judges to abridge the internationally recognized human rights of political and social reformers, those voicing criticism of prevailing policies, religious minorities, women, or others." [8] This concern is amplified by the fact that the new permanent constitution allows for the appointment of "experts in Islamic jurisprudence" to the Federal Supreme Court. [9]

Part Two of Art. 2 also mirrors the TAL formulation, with some changes:

1. The draft "guarantees" rather than "respects" the Islamic identity of the majority
2. The draft specifically references religious groups "such as" Christians, Yazidis, and Mandaean Sabians as being protected by the guarantee of the full religious rights of all individuals to freedom of religious belief and practice.

Guaranteeing Islamic identity may place the state in the role of protecting Islam, which in turn may permit the criminalization of apostasy, blasphemy, and other "offenses against religion," as well as result in discrimination against non-Muslims in a variety of areas.

Article 2 also contains promising language regarding the right to freedom of religion with respect to belief and practice, and specific mention of Yazidis may signal a positive development insofar as this religious group, which constitutes less than 1% of Iraq's population, is regarded by some Muslims as a religion of "devil worshippers." That said, there is still an open question as to whether the right to choose not to believe in any particular religion will be protected under this provision or whether other religions, such as the Baha'i faith, will also be able to exercise their full right to freedom of religion.

Recommendations

- Strengthen protection of human rights by specifying that no law shall contradict "the rights and basic freedoms stipulated in this constitution, *including the principles of equality and nondiscrimination, or the human rights guaranteed under international agreements to which Iraq is a state party*."
- Define more explicitly what the "established provisions of Islam" encompasses or excludes, and the possible sources available for making such a determination.
- Revert the constitution's guarantee concerning "the Islamic identity of the majority" to an expression of "respect for" that identity. This would minimize the possibility that the constitutional obligation to guarantee Islamic identity does not result in violations of the right to freedom of thought, conscience, religion or belief under international law.

Article 7:

First: Any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel (*takfir*) or ethnic cleansing, especially the Saddamist Ba'ath in Iraq and its symbols, under any name whatsoever, shall be prohibited. Such entities may not be part of political pluralism in Iraq. This shall be regulated by law.

Second: The State shall undertake to combat terrorism in all its forms, and shall work to

protect its territories from being a base, pathway, or field for terrorist activities.

Commentary

This article has the potential to be a positive provision in that it prohibits racism and the act of labeling individuals as "infidels," [\[10\]](#) problems that could impede democratic development and the exercise of human rights in Iraq. However, the current wording of the article is very broad and, without further refinement, the provision could limit the exercise of the right to freedom of thought, expression, association and other fundamental rights and freedoms.

Recommendations

- Clarify intent and scope of the prohibition on related to "accusations of being an infidel."
- Add language from the TAL prohibiting the arrest or detention of any individual "by reason of...religious beliefs." [\[11\]](#)

Article 10:

The holy shrines and religious sites in Iraq are religious and civilizational entities. The State is committed to assuring and maintaining their sanctity, and to guaranteeing the free practice of rituals in them.

Summary

- This article is intimately linked to the right to freedom of religion or belief, since safeguarding places of worship and guaranteeing the right to practice rituals are key components of the broader right.

Commentary

This article is positive insofar as it identifies holy shrines and religious places generally as "religious and civilizational entities." Earlier drafts specifically cited Shi'a religious shrines only. That said, this provision still omits the word "all" from the text leaving open to interpretation which shrines and religious places merit recognition and/or safeguarding.

Recommendation

- Revise text to explicitly provide equal protection and safeguard of right to practice rituals to "all holy shrines and religious places in Iraq."

Article 14:

Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

Summary

- International human rights standards require a state to extend equal status to "all individuals within its territory and subject to its jurisdiction," not only to its citizens. [\[1\]](#)
[2\]](#)
- The UN Human Rights Committee has specifically commented that States parties to the ICCPR should ensure that traditional, historical, religious, or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. [\[13\]](#)
- Principles of sharia should not be allowed to limit or restrict human rights guarantees,

including the right to equality and nondiscrimination, particularly for women and religious minorities. Such action could potentially undermine the very object and purpose of international treaties such as the ICCPR.

Recommendation

- Modify language to apply to "all individuals" rather than "Iraqis" only.

Article 29:

First:

A. The family is the foundation of society; the State shall preserve it and its religious, moral, and national values.

Summary

- This article may be used to justify or impose government-sanctioned religious values or principles on Iraqis.

Commentary

According to the ICCPR, if a set of beliefs is treated as official ideology in a constitution, this shall not result in any impairment of the freedom of thought, conscience or religion, or in any

discrimination against persons who do not accept the official ideology, or who oppose it. [\[14\]](#)

Iraq is a signatory to the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). [\[15\]](#) The Committee overseeing this treaty's implementation has recommended that "States parties should resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom," [\[16\]](#) and has been critical of reservations taken by States Parties which invoke a religious vision of the family as a basis for noncompliance with the treaty, especially as regards Arts. 2 and 16 of the CEDAW.

In fact, Iraq previously has submitted reservations to CEDAW on both of these articles, basing its objection to the treaty's equality provisions in part on the need to protect a role for sharia. [\[17\]](#)

The Committee has recommended that:

Whatever form [or concept the family] takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires. [\[18\]](#)

Moreover, the Committee maintains "the view that article 2 is central to the objects and purpose of the Convention" and that "reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn." [\[19\]](#)

Given the problematic nature of Iraq's existing reservations to CEDAW and the possible interpretation that may evolve from Art. 29, there is a basis for concern that the new constitutional language may be used to limit women's rights specifically-or the rights of all Iraqis generally-based on the imposition of state-interpreted and state-sanctioned values flowing from a single religious tradition.

Furthermore, under international standards, children should not be compelled to receive teaching on religion or belief that is against the wishes of the parents or guardians. International standards dictate that the freedom of parents to ensure a religious and moral education cannot

be restricted. [\[20\]](#)

Finally, it should be noted that the UN Human Rights Committee has found that "the concept of morals derives from many social, philosophical and religious traditions." Consequently, limitations imposed on Covenant rights "for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition." [\[21\]](#)

Recommendations

- Remove the term "religious" from the article.
- Specify that any limitations premised on "moral values" be based "on principles not deriving exclusively from a single tradition."
- Alternatively, specify that any action to preserve the family's religious, moral, and national values shall not violate equality and nondiscrimination for all Iraqis.

Article 35:

The state shall promote cultural activities and institutions in a manner that befits the civilizational and cultural history of Iraq, and it shall seek to support indigenous Iraqi cultural orientations.

Summary

- This article, introduced in the final round of constitutional negotiations, commits the Iraqi government to support "indigenous Iraqi cultural orientations." However, the phrase "indigenous Iraqi cultural orientations" is vague enough to present opportunities for potential discrimination in state funding and support for organizations and activities among the different religious communities in Iraq.

Commentary

There is nothing in this article to ensure that Iraq's minority cultures receive fair treatment in state support. Under Art. 27 of the ICCPR, minority groups “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The UN Human Rights Committee has interpreted Art. 27 to require that:

positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. [\[22\]](#)

In other words, any steps by the government to encourage a specific cultural vision cannot come at the expense of the rights of members of national, ethnic, religious, or linguistic minorities in Iraq.

Recommendations

- Implementation of Art. 35 of the constitution should ensure that the definition of “indigenous Iraqi cultural orientations” does not unfairly discriminate between persons in Iraq in the enjoyment of the rights established under the ICCPR, including Art. 27.
- The Iraqi government should take positive steps to ensure, in accordance with the ICCPR, the protection of minority identity, including the rights of all individual members of ethnic, religious or linguistic minorities to enjoy and develop their culture and language and to practice their religion.

Article 37:

Second: The State shall guarantee protection of the individual from intellectual, political and religious coercion.

Summary

- The ICCPR bars coercion that would impair the right to have or adopt a religion or belief, and this article improves on previous drafts that omitted altogether any provision prohibiting coercion in matters of religion. This provision is also promising insofar as it protects individuals rather than groups only.

Commentary

Under international law, no limitations are allowed on the freedom to have or to adopt a religion or belief, or on the freedom from coercion that would impair those rights. [\[23\]](#) Under the ICCPR, examples of coercion include the ‘use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment’ or other rights guaranteed under the ICCPR are similarly inconsistent with the treaty.

[\[24\]](#)

Art. 37 omits a clause found in the TAL that no one could be detained ‘by reason of political or religious beliefs.’ [\[25\]](#) Such a clause is critical to prevent the restriction of debate and dissent on religious and political questions based on the use of laws on blasphemy, apostasy, and other so-called ‘religious offenses.’

Recommendation

- Reinstate TAL provision that prohibits detention of individuals ‘by reason of political or religious beliefs.’

Article 38:

The State shall guarantee in a way that does not violate public order and morality:

- A. Freedom of expression using all means.
- B. Freedom of press, printing, advertisement, media and publication.
- C. Freedom of assembly and peaceful demonstration, and this shall be regulated by law.

Summary

- The qualifications on the fundamental rights to freedom of expression, press, and assembly may have implications for the protection of human rights.

Commentary

Under international law, any restrictions placed on the exercise of rights must be both prescribed by law **and** necessary in pursuit of specific public interests, including protection of public order and morality. [\[26\]](#) In all cases, any limitations must be directly related and proportionate to the specific need on which they are predicated.

Recommendations

- Remove qualification "regulated by law" concerning the right to freedom of assembly and peaceable demonstration.
- Any limitations must be interpreted in accordance with international standards.

Article 41:

Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law.

Summary

- This article apparently seeks to address personal status issues, and under what circumstances religious or civil law will govern such matters.
- Given the ambiguous language, it is unclear what legal system-religious or civil-will apply and what steps will be required by the parties involved to opt out of either system.
- Certain religious systems may be omitted or excluded from this arrangement, resulting in unrecognized minority groups potentially having to submit to the religious law of the dominant group (or another) religious community.

Commentary

As currently formulated, this article leaves open to the legislature how Iraqis will access civil courts for matters relating to personal status. Ultimately, this decision may result in individuals being compelled to submit to religious courts on matters of personal status. Such a variegated system also may raise concerns with respect to equality and nondiscrimination between men and women, as well as between members of the various religious communities in Iraq.

There are additional complications that may arise by not expressly guaranteeing that civil law will be the default option for personal status matters:

1. Requiring individuals who are non-believers to submit to religious rulings. [\[27\]](#)
2. Given significant concern that women will be unable to freely exercise their right to opt

into civil law without the consent of the spouse, that women will be forced to submit to a religious court.

3. Cases involving mixed marriages or individuals whose religious beliefs may not be recognized officially in Iraq may be resolved by using the country's dominant religion as the default.

Finally, international human rights organizations, such as Amnesty International, have previously observed that criteria for appointing religious court judges may fall short of international standards with regard to training for judicial personnel. [\[28\]](#)

Recommendations

- The article should clearly state that the default system is civil law, and that the free and informed consent of both parties is required to move a hearing regarding personal status to the religious law system.
- To ensure equality and nondiscrimination within the religious court system and to further guarantee the human rights enshrined in the Iraqi constitution, art. 41 should affirm that religious court rulings are subject to the final review under Iraq's civil law.
- Appointment of judges to courts adjudicating personal status matters, including any religious courts, should meet international standards with respect to judicial training.

Article 42:

Each individual shall have the freedom of thought, conscience, and belief.

Summary

- This is a positive article reflecting international human rights guarantees that was missing from earlier drafts.
- Although Art. 2 provides for the "full religious rights to freedom of religious belief

and practice," this right should be reiterated here, as part of the chapter on fundamental rights and freedoms.

Recommendation

- This article can be strengthened by adding "religion" to the list of freedoms.

Article 43:

First: The followers of all religions and sects are free in the:

- A. Practice of religious rites, including the Husseinite rituals.
- B. Management of religious endowments (*waqf*), their affairs, and their religious institutions, and this shall be regulated by law.

Second: The State shall guarantee freedom of worship and the protection of places of worship.

Summary

- Some language remains a possible basis for narrow interpretation of the right to freedom of religion or belief.
- In particular, the second part of article 43 reflects an improvement on previous draft language.

Commentary

Freedom of thought, conscience, and religion or belief encompasses more than the “practice of religious rites.” Use of the term “religious rites” may be narrowly interpreted and result in constraints against the right to freedom of religion or belief. The same is true of “freedom of worship,” which is why Art. 42 should refer specifically to freedom of religion as a protected right. The full scope of the right to manifest religion or belief includes the rights of worship, observance, practice, and teaching, broadly construed.

Under international law, these rights, including the management of religious institutions, may be subject to only such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Limitations are not allowed on grounds not specified under Art. 18 of the ICCPR, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Finally, limitations on the freedom to manifest a religion or belief that rely on morality must be based on principles not deriving from a single tradition. [\[29\]](#)

Recommendation

- Modify Part One accordingly:

First: *All individuals are free to manifest religion or belief, including:*

- A. *Worship, observance, practice, and teaching*, including the Hussein rituals.
- B. Management of religious endowments (waqf), their affairs, and their religious institutions.

Article 45:

First: The State shall seek to strengthen the role of civil society institutions, and to support, develop and preserve their independence in a way that is consistent with peaceful means to achieve their legitimate goals, and this shall be regulated by law.

Second: The State shall seek the advancement of the Iraqi clans and tribes, shall attend to their affairs in a manner that is consistent with religion and the law, and shall uphold their noble human values in a way that contributes to the development of society. The State shall prohibit the tribal traditions that are in contradiction with human rights.

Summary

- This article has the potential to be a positive provision in that it promotes the role of civil society organizations, one tool that can facilitate democratic development and protections for human rights.
- This article also takes the positive step of explicitly prohibiting tribal practices that are deemed inconsistent with human rights.
- The current wording however, is very broad, particularly with regard to terms such as "peaceful means" and "legitimate goals." Without further refinement, these terms may be interpreted to limit the exercise of the right to freedom of assembly, association, and other fundamental rights and freedoms, under the government pretext of ensuring "peace" or defining the scope of "legitimate goals."

Commentary

The amendment of this provision to ensure the unfettered development of peaceful civil society organizations is of particular significance, especially given recent reports of legislative efforts already underway to restrict the organization and operation of nongovernmental organizations (NGOs) in Iraq. [\[30\]](#)

Recommendations

- Remove language regarding "legitimate goals" to ensure that the state is not positioned to approve only those civil society organizations that reflect the views of the government.
- The current wording of Part Two makes a reference to "manner that is consistent with religion..." The meaning and intent of this provision should be clarified.

Article 46:

Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom.

Summary

- This article is problematic as it opens the door to overly broad limitations on human rights guarantees, inconsistent with international standards.
- This article also appears to contradict or at least narrow application of the supremacy of the constitution established at Art. 13.

Commentary

Although international treaties such as the ICCPR permit certain limitations on human rights guarantees under specific, narrowly constructed conditions, this article open the door to limitations on rights that may go far beyond these conditions, and result in the possible undermining of the right while preserving its "essence." Judicial or legislative interpretation of what might violate the "essence of the right or freedom" leaves substantial room for diluting the scope of a given right and rendering human rights protections essentially ineffective.

Recommendations

- Provide that any limitation shall comply with the standards set forth under the ICCPR and other international human rights treaties, and will not limit these rights in any other manner.

Article 90:

The Higher Juridical Council shall oversee the affairs of the judicial committees. The law shall specify the method of its establishment, its authorities, and the rules of its operation.

Recommendation

- Given the significant scope of powers that will rest with the Higher Juridical Council, the guidelines for its establishment and operation should, at a minimum, require a 2/3 majority vote within the Council of Representatives.

Article 92:

First: The Federal Supreme Court is an independent judicial body, financially and administratively.

Second: The Federal Supreme Court shall be made up of a number of judges, experts in

Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.

Summary

- This article is problematic insofar as it potentially mandates that experts in Islamic jurisprudence and without any civil law training may be appointed to the Iraq's highest court.

Commentary

Opening the Court bench to individuals whose only background is in sharia will place Iraq's judiciary in the company of Iran, Saudi Arabia, and Afghanistan-some of the only countries in the world to allow individuals without traditional legal training to serve as judges in matters pertaining to civil law. Even Pakistan, which has sharia courts, also has a civil Supreme Court, which has moved to overturn specific instances where sharia principles would be used to violate human rights, including the imposition of death sentences for blasphemy. According to basic principles formulated by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders, "Persons selected for judicial office shall be individuals of integrity and ability *with appropriate training or qualifications in law.*" [\[31\]](#)

The rationale behind installing experts in Islamic jurisprudence on the bench is premised on the need to interpret the implications of having sharia as a fundamental source of legislation. However, requiring the appointment of experts trained only in Islamic jurisprudence to Iraq's highest court may also run afoul of the UN General Assembly's view that methods of judicial selection shall not discriminate "against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status." [\[32\]](#)

The *Arab Human Development Report 2004*, prepared by the United Nations Development Program, observes that independence of the judiciary is threatened in the Arab world in part as a result of interference by undemocratic, ideological regimes. These regimes interfere with judicial independence under the pretext of "protecting the ideological foundations" of the state. [\[33\]](#) The system used for making judicial appointments is one means by which the executive or legislature may exert control over

the judiciary. Indeed, those justices appointed to the Supreme Court who are trained solely in Islamic jurisprudence may be more likely to reflect an interpretation which favors the dominant religious sect in Iraq, rather than a judicial approach that is objective and evenly applied to all Iraqis.

That said, the requirement of a 2/3 majority in this draft may be used to ensure an implementing statute that can prevent egregious attempts to abuse this article. However, at this point, it remains an open question whether the appointment of individual judges ultimately will require a similar 2/3 majority.

Recommendations

- Remove the ability of making appointments to the Federal Supreme Court based on training in Islamic jurisprudence alone. At a minimum, require that all judges have training in civil law, including a law degree.
- Clarify the appointment procedure to specifically state that a 2/3 majority of parliament is required to appoint a judge to the Federal Supreme Court.

Article 102:

The High Commission for Human Rights, the Independent Electoral Commission, and the Commission on Public Integrity are considered independent commissions subject to monitoring by the Council of Representatives, and their functions shall be regulated by law.

Summary

- This article does not explicitly guarantee the independence of the High Commission for Human Rights or specify that its functions shall be in accordance with the UN's Paris Principles.

Commentary

Art. 50 of the TAL called for the creation of a National Commission for Human Rights, in accordance with the Paris Principles issued by the United Nations, "for the purpose of executing the commitments relative to the rights set forth in this Law and to examine complaints pertaining to violations of human rights." The TAL further envisioned that this Commission would "include an Office of the Ombudsman to inquire into complaints, [and have] the power to investigate, on its own initiative or on the basis of a complaint submitted to it, any allegation that the conduct of the governmental authorities is arbitrary or contrary to law." The importance of an independent body designed to monitor and investigate human rights complaints in Iraq cannot be overstated.

Recommendations

- Clearly provide for the independent and non-sectarian establishment of a High Commission for Human Rights with a mandate to investigate individual complaints.
- Remove monitoring oversight by the Council of Representatives.
- Include reference to the Paris Principles as the basis for the High Commission's functions and operations.

Article 104:

A commission named The Martyrs' Foundation shall be established and attached to the Council of Ministers, and its functions and competencies shall be regulated by law.

Recommendations

- Clarify meaning and intent of this Commission.

- Ensure that the Commission will not be used for sectarian purposes or in any other discriminatory manner.

Article 126:

Second: The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days.

Recommendation

- As a means of further securing the human rights provided in the constitution, the amendment formula should state that human rights guarantees and protections cannot be subject to any amendment that would weaken their application or effect. For example, Kuwait's constitution prevents amendments with respect to "the principles of liberty and equality... [unless such an amendment serves] to increase the guarantees of liberty and equality." [34]

[1] Iraq signed the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS on March 23, 1976, without declaration or reservation. See Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 9, 2004), <http://www.unhchr.ch/pdf/report.pdf> [h](#)

[hereinafter ICCPR].

[2] Hum. Rts. Comm., gen. cmt. 22, art. 18, para. 9 (forty-eighth session, 1993), UN Doc. # CCPR/C/21/Rev.1/Add.4 (1994), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument) [hereinafter HRC General Comment No. 22].

[3] Tad Stahnke and Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 *Geo. J. Int'l L.* 947, 959 (2005) [hereinafter Stahnke and Blitt].

[4] *Id.* at 959. In Egypt, the interpretive role has fallen to the Supreme Constitutional Court, whereas in Pakistan, the constitution specifically assigns this role to the Federal Shariat Court.

[5] Iraq Const. art.93(2).

[6] The Transitional Administrative Law provides under Art. 7(a), that “Islam is the official religion of the State and is to be considered *a source of legislation*. No law that contradicts the *universally agreed tenets of Islam*”^u, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period. This Law respects the Islamic identity of the majority of the Iraqi people and *guarantees the full religious rights of all individuals to freedom of religious belief and practice*” (emphasis added) [hereinafter TAL].

[7] The Iraqi judiciary likely will be tasked with determining the significance, if any, of this shift in wording.

[8] Press Release, USCIRF, Iraq: USCIRF Commends Extensive Protection of Human Rights in Interim Constitution (March 8, 2004), <http://uscirf.gov/mediaroom/press/2004/ma>

[rch/03082004_iraq.html](#)

[9] Iraq Const. art.92. This provision is discussed in greater detail below.

[10] In theory, this article may, by extension, cover accusations of apostasy as well.

[11] TAL, art. 15(c).

[12] ICCPR, *supra* note 1, at art. 2(1), Mar. 23, 1976, 999 U.N.T.S. 171..).

[13] Hum. Rts. Comm., gen. cmt. 28, art. 3, para. 5 (2000), U.N. Doc. # CCPR/C/21/Rev.1/Add.10, March 23, 2000 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument)

[14] HRC General Comment No. 22, *supra* note 2, at para. 10.

[15] Iraq signed onto CEDAW on August 13, 1986.

[16] THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, General Recommendation No. 21: Equality in Marriage and Family Relations, U.N. Doc. # A/49/38 para 4 (February 4, 1994) <http://www.unhchr.ch/tbs/doc.nsf/0/7030ccb2de3baae5c12563ee00648f1f?Opendocument> [hereinafter, CEDAW General Recommendation No. 21].

[17] Iraq's reservation reads in part: "1. Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of article 2, paragraphs (f) and (g), of article 9, paragraphs 1 and 2, nor of article 16 of the Convention. The reservation to

this last-mentioned article shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them." A number of countries have protested the legitimacy of this reservation on the basis that it undermines the object and purpose of CEDAW. See <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N31> and http://www.bayefsky.com/html/iraq_t2_cedaw.php.

[18] CEDAW General Recommendation No. 21, *supra* note 18, at para. 13.

[19] CEDAW, Reservations to CEDAW, (August 12, 2005) available at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.

[20] HRC General Comment No. 22, *supra* note 2, at para. 8; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, at art. 5(2) (November 25, 1981).

[21] HRC General Comment No. 22, *supra* note 2, at para. 8.

[22] Hum. Rts. Comm., gen. cmt. 23, art. 27, para. 6., U.N. Doc. # CCPR/C/21/Rev.1/Add.5, April 8, 1994, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument) [hereinafter, HRC General Comment No. 23].

[23] HRC General Comment No. 22, *supra* note 2, at para. 8

[24] *Id.* at para 5.

[25] TAL, art. 15(c).

[26] See ICCPR, *supra* note 1, at Arts. 18, 19, 21, & 22; See also The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., at art. 29 (1948).

[27] It should be noted that the right to freedom of religion and belief also protects the right to hold non-theistic or atheistic beliefs. International standards protecting these rights are not limited in application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. HRC General Comment No. 22, *supra* note 2, at para. 2.

[28] Amnesty International, BAOBAB for Women's Human Rights and Amnesty International Joint Statement on the Implementation of New Sharia-based Penal Codes in Northern Nigeria (March 25, 2002), <http://web.amnesty.org/library/index/engaf440082002> .

[29] HRC General Comment No. 22, *supra* note 2, at para. 8.

[30] U.S. Dept. of State, Section 2207 Report Quarterly Update to Congress on Iraq Relief and Reconstruction, 14, January 2006, <http://www.state.gov/p/nea/rls/rpt/2207/> .

[31] BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26 - Sept. 6, 1985, U.N. Doc A/Conf.121/22/Rev.1 at art. 10 (1985) (emphasis added) http://www.unhcr.ch/html/menu3/b/h_comp50.htm .

[32] *Id.* at art. 10.

[\[33\]](#) United Nations Development Programme, Arab Human Development Report 122 (2004).

[\[34\]](#) Kuwait Const. art. 175.